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ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ABDON SANTIAGO individually and on
behalf of all others similarly situated,

Plaintiff,

v.

EQUABLE ASCENT FINANCIAL, a/k/a
EAF; AHN REGENT d/b/a REGENT &
ASSOCIATES; DOES 1-20

Defendants.

Case No.: CV 11 -03158-EDL

**NOTICE OF MOTION AND MOTION TO
STRIKE AFFIRMATIVE DEFENSES**

Date: October 14, 2011

Time: 10:00 a.m.

Judge: Honorable Charles R. Breyer

**Location: Courtroom 6, 17th Floor
450 Golden Gate Ave, San Francisco, CA**

TO ALL DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 14, 2011 at 10:00 a.m. or as soon thereafter as
this matter may be heard, in Courtroom 6 of the United States District Court, located at 450
Golden Gate Avenue, San Francisco, California, before the Honorable Charles R. Breyer, United
States District Court Judge, Plaintiff will move this Court for an Order striking ¶¶ 29-41 from
Defendants' complaint.

This motion is made pursuant to Fed. R. Civ. P. 12(f) and Civil L. R. 7-2 on the ground

1 that the affirmative defenses are not plead with sufficient particularity to provide Plaintiff with
2 “fair” notice of the defenses being advanced and the pleadings fail to raise the alleged defenses
3 beyond the speculative level.

4 The motion is based on this Notice of Motion to Strike Affirmative Defenses and the
5 Memorandum of Points and Authorities to Strike Affirmative Defenses filed herewith, and such
6 other evidence, argument, and authorities which may be presented at or prior to the hearing
7 before this Court on this Motion, and such other and further matters of which this may take
8 judicial notice.

9
10 DATED: 9/05/2011

/s/
Irving L. Berg
O. Randolph Bragg

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13 ATTORNEYS FOR PLAINTIFF
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ABDON SANTIAGO individually and on
 behalf of all others similarly situated,

Plaintiff,

v.

EQUABLE ASCENT FINANCIAL, a/k/a
 EAF; AHN REGENT d/b/a REGENT &
 ASSOCIATES; DOES 1-20

Defendants.

Case No.: CV 11 -03158

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF MOTION
 TO STRIKE AFFIRMATIVE DEFENSES**

Date: October 14, 2011

Time: 10:00 a.m.

Judge: Honorable Charles R. Breyer

**Location: Courtroom 6, 17th Floor
 450 Golden Gate Ave, San Francisco, CA**

Plaintiff, Abdon Santiago, ("Plaintiff"), by and through his attorneys submits the
 following Memorandum of Points and Authorities in Support of Motion to Strike Affirmative
 Defenses.

I. INTRODUCTION

Defendants are represented by the same law firm, Berman, Berman & Berman which filed
 the same answers as to each Defendant with the same affirmative defenses (Docs 7 and 9, ¶¶ 29-
 41). This motion is to strike the affirmative defenses set forth in each answer. The affirmative

1 defenses are at ¶¶ 29-41.

2 Plaintiff's motion is based on the ground that the defenses are not plead with sufficient
3 particularity to provide Plaintiff with "fair" notice of the defenses being advanced and the
4 pleadings fail to raise the alleged defenses beyond the speculative level.

5 **II. STATEMENT OF FACTS**

6 In their Answer, Defendants set forth several conclusory statements with no factual
7 support whatsoever contending they raise various alleged affirmative defenses. These defenses
8 are at ¶¶ 29-41 as shown at Exhibit A.

9 **III. STANDARD OF REVIEW**

10 Following the Supreme Court decision in *Ashcroft v. Iqbal*, Defendant's affirmative
11 defenses are inadequate to survive the requirement for pleadings under the federal rules. Under
12 Fed. R. Civ. 12(f), a Court may strike from a pleading an insufficient defense if it does not
13 provide the Plaintiff with "fair notice" of the defense. The purpose of a Rule 12(f) motion is to
14 avoid spending time and money litigating spurious issues.

15 Affirmative defenses are governed by the same pleading standard as complaints and must
16 give Plaintiff fair notice of the defense being advanced. Affirmative Defenses are pleadings and
17 subject to all pleading requirements of the Federal Rules of Civil Procedure.

18 **IV. ARGUMENT**

19 Over the past two years, the Supreme Court markedly changed the standard required for
20 pleading under Rule 8 of Federal Rules of Civil Procedure. First, in *Bell Atlantic Corp. V.*
21 *Twombly*, the Court held that although Rule 8(a)(2) requires only a "short and plain statement," a
22 complaint must contain "more than labels and conclusions" or a "formulaic recitation of the
23 elements of a cause of action." The factual allegations contained in a complaint "must be enough
24 to raise a right to relief above the speculative level, on the assumption that all allegations in the
25 complaint are true (even if doubtful in fact)." Following this opinion, many lower courts
26 concluded that the opinion extended beyond complaints arising under Article 1 of the Sherman
27 Act, and that the Supreme Court had jettisoned the liberal notice pleading standard set forth in
28 *Conley v. Gibson*. Other courts disagreed. They read *Twombly* to apply in antitrust litigation

1 only.

2 On May 18, 2009, the Supreme Court resolved the differences among the Courts and held
3 that *Twombly* applies to all civil litigation. In *Ashcroft v. Iqbal*, the Supreme Court stated a
4 Court must “draw the reasonable inference that the defendant is liable [and even w]here a
5 complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of
6 the line’” of the plausibility required to state a claim. Though there does not appear to be a
7 Circuit level court that has addressed the issue, many district courts have found that *Twombly* and
8 *Iqbal* apply to affirmative defenses.

9 Because a claim is plausible on its face if it “raises a right to relief above the speculative
10 level” by pleading enough “factual content that allows the court to draw the reasonable inference
11 that the defendant is liable for the misconduct alleged,” the same standard should be applicable to
12 affirmative defenses. Some facts need to be set forth to alert the plaintiff to the defense. When
13 no facts are asserted in support of an affirmative defenses, neither the *Twombly* or *Iqbal* standard
14 has been met. The appropriate response is to strike the alleged defense.

15 Striking the defense follows the logic of *Iqbal*. The *Iqbal* case expounds beyond the plain
16 language of Fed. R. Civ. P. 8. Thus, there is no reason to believe that the Supreme Court would
17 not allow an affirmative defense to stand without providing material facts linking it to the legal
18 theory. Merely listing “boiler plate” defenses without facts cannot survive after *Iqbal*.

19 Often a plaintiff is forced to plead generalities, because the facts necessary to detail an
20 allegation are in the sole possession of a defendant. The specific information cannot be
21 unmasked without discovery. Thus, a plaintiff may have plausible grounds in arguing why a fact
22 exists within the sole control of the defendant. This has historically been the reason supporting a
23 liberal pleading standard for a plaintiff. The same logic does not apply for a defendant pleading
24 affirmative defenses. For example, if a defendant contends a claim is barred on bona fide error
25 grounds, the defendant should know the specific bona fide error that occurred, or the facts on
26 which the plaintiff has purportedly filed an untimely complaint. The defendant must set forth the
27 facts in support of its affirmative defense. The plaintiff should not be left guessing, “What is the
28 claimed bona fide error?” “What is the date that triggered the limitations period as contended by

1 the defendant?"

2 In deciding which defenses to plead, the defendant must apply facts to law. It is not too
3 much to ask that a defendant disclose the facts with each of its affirmative defenses. Having
4 failed to do so requires the defense to be stricken pursuant to Fed. R. Civ. P. 12(f).

5 *Iqbal* requires a plaintiff to do more than plead something more than mere "labels and
6 conclusions." A defendant should be held to the same standard; a defendant should not be able
7 to assert defenses hoping to find at a later date some fact that supports the defense. In this
8 instance, Defendant has not set forth sufficient facts to support any of its affirmative defenses. It
9 is impossible to determine if any of the defenses labeled in ¶¶ 29-41 of Defendant's Answer are
10 plausible on their face. Therefore, Plaintiff requests that each of these defenses be stricken
11 pursuant to *Iqbal*.

12 V. CONCLUSION

13 For the foregoing reasons, Plaintiff requests that the Court strike ¶¶ 29-41 from
14 Defendants' answer.

15 DATED: 9/05/2011

/s/
Irving L. Berg
O. Randolph Bragg

17 ATTORNEYS FOR PLAINTIFF
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1 belief as to the truth or falsity of the allegations set forth in
2 paragraph 28 of Plaintiff's Complaint, and therefore denies same.

3 AFFIRMATIVE DEFENSES

4 FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE, EAF
5 IS INFORMED AND BELIEVES, AND BASED THEREON ALLEGES:

6 29. Neither the Complaint nor any cause of action thereof
7 states facts sufficient to constitute a cause of action against EAF.

8 FOR A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE, EAF
9 IS INFORMED AND BELIEVES, AND BASED THEREON ALLEGES:

10 30. The Complaint is barred as against EAF by the Statutes of
11 Limitation, including, but not limited to, 15 U.S.C. Section
12 1692k(d), Civil Code Sections 1783 and 1788.30(f), and Code of Civil
13 Procedure Sections 335.1, 338, 340 and 343.

14 FOR A THIRD, SEPARATE AND AFFIRMATIVE DEFENSE, EAF
15 IS INFORMED AND BELIEVES, AND BASED THEREON ALLEGES:

16 31. If Plaintiff suffered any damages, which EAF specifically
17 denies, said damages were the proximate result of the sole actions
18 of persons and/or entities over whom EAF had no control, and any
19 recovery against EAF must be barred or reduced in proportion to the
20 amount of fault attributable to said persons and/or entities.

21 FOR A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE, EAF
22 IS INFORMED AND BELIEVES, AND BASED THEREON ALLEGES:

23 32. Plaintiff's Complaint is barred under the equitable
24 doctrine of Laches.

25 FOR A FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE, EAF
26 IS INFORMED AND BELIEVES, AND BASED THEREON ALLEGES:

27 33. Plaintiff's Complaint is barred under the doctrine of
28 Unclean Hands.

Plaintiff's Exhibit

1 FOR A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE, EAF
2 IS INFORMED AND BELIEVES, AND BASED THEREON ALLEGES:

3 34. That EAF is entitled to the right of indemnification by
4 apportionment against all other parties and persons whose negligence
5 contributed proximately to the happening of the claimed incident or
6 alleged injuries.

7 FOR A SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE, EAF
8 IS INFORMED AND BELIEVES, AND BASED THEREON ALLEGES:

9 35. That EAF is entitled to the right of contribution from any
10 person whose negligence proximately contributed to the happening of
11 the claimed incident or alleged injuries if said Plaintiff should
12 receive a verdict against EAF.

13 FOR A EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE, EAF
14 IS INFORMED AND BELIEVES, AND BASED THEREON ALLEGES:

15 36. That Plaintiff, by her actions, has waived the right, if
16 any, to seek the relief requested in the Complaint.

17 FOR A NINTH, SEPARATE AND AFFIRMATIVE DEFENSE, EAF
18 IS INFORMED AND BELIEVES, AND BASED THEREON ALLEGES:

19 37. That Plaintiff failed to mitigate her damages, if any, in
20 that she failed to use reasonable diligence in caring for her
21 injuries and reasonable means to prevent aggravation of said
22 injuries.

23 FOR A TENTH, SEPARATE AND AFFIRMATIVE DEFENSE, EAF
24 IS INFORMED AND BELIEVES, AND BASED THEREON ALLEGES:

25 38. The purported violations of the federal and state Fair
26 Debt Collections Practices Act were not intentional and resulted
27 from a bona fide error, despite the maintenance of procedures
28 reasonably adopted to avoid any such violation(s).

1 FOR A ELEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE, EAF
2 IS INFORMED AND BELIEVES, AND BASED THEREON ALLEGES:

3 39. EAF cured any purported violations of the Fair Debt
4 Collection Practices Act within the time permitted under Civil Code
5 Section 1788.30(d).

6 FOR A TWELFTH, SEPARATE AND AFFIRMATIVE DEFENSE, EAF
7 IS INFORMED AND BELIEVES, AND BASED THEREON ALLEGES:

8 40. Plaintiff has neither alleged the existence of any
9 putative class nor the right to proceed on behalf of any such
10 putative class.

11 FOR A THIRTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE, EAF
12 IS INFORMED AND BELIEVES, AND BASED THEREON ALLEGES:

13 41. EAF alleges that it may have other, separate, and
14 additional defenses of which it is not presently aware, and hereby
15 reserves the right to assert them by amendment to this answer when
16 discovery is complete.

17 WHEREFORE, having fully answered, Defendant EQUABLE ASCENT
18 FINANCIAL prays that Plaintiff take nothing by virtue of her
19 Complaint, that judgment be entered in favor of Defendant, and
20 against Plaintiff, and that Defendant be awarded costs of suit and
21 attorneys' fees incurred herein and for such other and further
22 relief as the court deems proper.

23 Dated: August 2, 2011

BERMAN, BERMAN & BERMAN, LLP

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25
26 By: 

SPENCER A. SCHNEIDER

Attorneys for Defendants,
27 ANH REGENT dba REGENT & ASSOCIATES
28 and EQUABLE ASCENT FINANCIAL